

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION I

CA 06-680

APRIL 4, 2007

J. SOMERS MATTHEWS
APPELLANT

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
SEVENTEENTH DIVISION,
[NO. DV-95-936]

V.

HONORABLE MACKIE MCCLELLAN
PIERCE, JUDGE

KATHERINE MATTHEWS
APPELLEE

REVERSED IN PART; AFFIRMED IN
PART

This is an appeal of a domestic relations proceeding heard in Pulaski County Circuit Court. Appellant Justin Somers Matthews appeals the trial court's order increasing alimony and ordering a one-time child support award from a stock sale, which directed him to pay his ex-wife, appellee Katherine Matthews. We reverse the alimony award, and we affirm the child support award.

We begin our discussion with an overview of what led to the present litigation. The parties divorced in September 1995 pursuant to a decree issued by the Pulaski County Chancery Court. Somers, who owns substantial non-marital family-related assets, was at that time employed at Stephens, Inc., earning approximately \$500,000 per year. Katherine was

not employed, and she did not have a college degree. Katherine was awarded custody of their children: two sons and one daughter, born in 1982, 1984, and 1989, respectively. Somers was ordered to pay \$10,038.22 per month in child support for the three children. Katherine was awarded alimony that began at \$4500 per month, decreasing over time but ending only upon her death or remarriage. The marital residence at 51 Edgehill Road in Little Rock, and another residence at 3600 Oakwood in Little Rock, were ordered to be sold with the proceeds divided. Several bank accounts were declared marital and divided evenly. A Stephens, Inc., 401(k) plan and IRA were divided upon divorce. Certain assets were declared to be Katherine's non-marital property: the Hill Apartments in Little Rock, a home and acreage in Scott, Tull's Store near Scott, and her membership in the Little Rock Country Club.

Months later, in an order filed in May 1996, child support was reduced to \$3,096.80 per month, and alimony was reduced to \$1,935.50 per month, due to a material change in Somers's earnings when he left his employment with Stephens, Inc. The parties agreed between themselves to reduce child support to \$2,500 when one of their sons began living with Somers. In March 1997, a charging order was entered by the circuit court, directing Somers to pay any distributions of funds from his interest in the family business (denoted "Matthews Properties") into the registry of the court.

As relevant to this appeal, both sons¹ eventually moved in with Somers, who bought a house in Little Rock where he lived with his girlfriend. Their daughter Alice remained with Katherine, living in her house in Scott, Arkansas. Alice was a high school student attending Mount St. Mary Academy in Little Rock. Alice was said to be a high-achieving student who planned to attend college.

In June 2005, Katherine filed a motion for an increase in child support for Alice, who was at that time approximately sixteen years old. Somers resisted Katherine's request, moved to terminate alimony, and moved to enforce visitation with their daughter. Katherine responded with an amended request, adding a petition to increase alimony. Before the hearing in January 2006 on the pending motions, the parties agreed on child support, stipulating that his average income since 2004 would result in a child support duty for Alice of \$3,755.16 per month, effective from and after June 2005 when Katherine filed her motion for an increase. The parties were unable to resolve how much child support, if any, was due and owing from a pending stock sale. The parties could not resolve the issue of alimony. Thus, these issues were tried before the circuit judge.

The testimony regarding Somers and his income demonstrated that he had the ability to pay more alimony. Somers, after leaving his job at Stephens, Inc., completed a college degree and became a school teacher, earning just over \$32,000 annually. However, since 2004, the income received from his interest in Matthews Properties increased dramatically.

¹They reached the age of majority by the year 2002.

Somers had an average net monthly income in 2004 and 2005 of approximately \$25,000 per month. Even after deducting child support, Somers had income in excess of \$20,000 per month. Somers did not dispute that he had enjoyed two years of significant income from his non-marital assets, but said that he was not in an active managerial position, such that any income was variable and not assured each year. Somers believed that his ex-wife was exaggerating her claim of being physically incapable of working, especially considering that she never applied for any job, never tried to finish her college degree, and was simply uninterested in working when all of her bills were paid.

The testimony regarding Katherine showed that she had rheumatoid arthritis that her doctor opined prevented her from working a full time, and perhaps even a part time, job. In the ten years since their divorce, she agreed she had not sought employment, retraining, or to finish her college degree. Katherine stated that she had good days and bad days, and she recounted some surgical repairs she had undergone since their divorce. Her typical routine would entail her driving Alice to school in Little Rock and returning home and managing her apartment buildings in Little Rock, which generated about \$1000 per month in income. Katherine stated that she was not as able to help in maintaining the apartments. Katherine agreed that she exercised with a personal trainer at the Little Rock Country Club twice per week in the fitness facility, using free weights and other work out machines. She said she needed more alimony so that she could hire a maid to clean her house, to hire a person to mow her yard, and to hire help with household and apartment repairs she could no longer do.

While she was able to manage these tasks sometimes, she described them as difficult activities that often took a toll on her stamina. Katherine also said that although her present vehicle was paid for, she anticipated that in the future she would need to buy a new car.

Katherine's Affidavit of Financial Means listed monthly income of \$5400, from rental income, child support, and alimony. She listed savings, stocks and bonds, and an IRA, valued at a total of \$183,438. Katherine totaled her required and incidental monthly living expenses at \$5,217.18. This total included her monthly dues of \$377 to the Country Club, but did not include her \$60 monthly personal trainer fee or \$30 monthly mandatory food service charge at the Club that she testified at the hearing that she was required to pay.

Testimony regarding Somers's financial status was entered into evidence, including sealed testimony about the pending stock sale. Somers testified about his general spending habits, which included supporting his two grown sons and his girlfriend and paying for trips and other luxuries. His counsel argued that any monies from the stock sale should be calculated in the following year's tax returns, not in an immediate lump sum.

After taking the issue under advisement, the trial judge ordered an increase in alimony to \$3500 per month based upon Somers's ability to pay and Katherine's need. Regarding alimony, the judge recited that he considered the relevant statutory authority and factors enumerated in case law regarding alimony. The order recited Somers's average monthly net income in the years 2004 and 2005 at \$25,034.38, and recited Somers's lifestyle "where money is apparently spent freely and with no or little regard for what may come in the future"

including approximately \$3000 in his cash expenditures per month over those two years. The trial court awarded a lump-sum child support payment of fifteen percent of the net proceeds from the sale of Somers's stock interest in the family business, which was \$66,482.86. Katherine was ordered not to spend any of the lump sum without a prior order from the court and to account for any expenses. Other matters were ordered that are not argued as reversible error. Somers filed timely notices of appeal.

Somers argues first that the trial court clearly erred in increasing alimony and by not terminating alimony. The argument focuses on the large amounts that Somers has paid Katherine over the eleven years since they divorced, Katherine's lack of debt and financial security due to her share of marital and non-marital assets, and on his contention that Katherine can work despite having rheumatoid arthritis. Somers points out that Katherine was awarded an increase in child support for their remaining child that amounts to more than \$45,000 in tax-free income per year. He adds that he had not worked for Stephens, Inc., since 1996, instead working as a teacher and earning \$32,500 per year. He also points out that his pre-marital assets do not guarantee income, and he has had to deplete his retirement accounts over the years for recurring expenses. In sum, his argument is that this award is not based upon real need, but is rather a means to improperly deprive him of his pre-marital assets.

A trial judge's decision whether to award alimony is a matter that lies within his or her sound discretion and will not be reversed on appeal absent an abuse of that discretion. *Davis*

v. Davis, 79 Ark. App. 178, 84 S.W.3d 447 (2002). The purpose of alimony is to rectify economic imbalance in the earning power and the standard of living of the parties to a divorce in light of the particular facts of each case. *Harvey v. Harvey*, 295 Ark. 102, 747 S.W.2d 89 (1988). Modification of an award of alimony must be based on a change of circumstances of the parties. *Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998). The primary factors that a court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.* Secondary factors that may also be considered include: (1) the financial circumstances of both parties; (2) the couple's past standard of living; (3) the value of jointly owned property; (4) the amount and nature of the income, both current and anticipated, of both parties; (5) the extent and nature of the resources and assets of each of the parties; (6) the amount of each party's spendable income; (7) earning ability and capacity of both parties; (8) the property awarded to each party; (9) the disposition of the homestead or jointly owned property; (10) the condition of health and medical needs of the parties; (11) the duration of the marriage. *Delacey v. Delacey*, 85 Ark. App. 419, 155 S.W.3d 701 (2004). The amount of alimony should not be reduced to a mathematical formula because the need for flexibility outweighs the need for relative certainty. *See Mitchell v. Mitchell*, 61 Ark. App. 88, 964 S.W.2d 411 (1998).

In this instance, we are firmly convinced that a mistake has been committed. Thus, we reverse the increased award of alimony and reinstate alimony at \$1,935.50 per month. Undoubtedly, Somers had the ability to pay, at least at the time the order was entered, and

Katherine demonstrated some need. Thus, Somers is incorrect in arguing that alimony should cease. The material issue here, though, is that Katherine did not demonstrate a need that was left unsatisfied by what she was already ordered to receive. At the time Katherine sought an increase in alimony, her Affidavit of Financial Means demonstrated that her income exceeded her expenses, before a substantial increase of over \$1,250 per month in child support was awarded. We hold that the trial court clearly erred in finding that Katherine demonstrated a greater need. We therefore reverse the increase in alimony, reinstating the amount previously ordered of \$1,935.50 per month.

We recognize that Alice will soon reach the age of majority, child support will cease, private school tuition will cease, Katherine's health may further decline, and that the parties may petition the court for appropriate relief at any time material changes occur. However, our present review is focused on the status of the parties at the time the competing requests were heard.

As to the lump-sum child support, Somers argues to us that the trial court clearly erred because at the time the order was made, the sale had not yet occurred and could not be prospectively ordered; clearly erred because this income should have been considered as income when it appeared on his income tax forms the following year; and clearly erred because this lump-sum resulted in a windfall to Katherine. Somers claims that Katherine's strategy was to access these monies prior to the year 2007 because their daughter would no

longer be in high school in May 2007. We disagree with his arguments and affirm the order regarding child support.

We review child-support awards de novo on the record. *Davie v. Office of Child Support Enforcement*, 349 Ark. 187, 76 S.W.3d 873 (2002) (citing *Nielsen v. Berger-Nielsen*, 347 Ark. 996, 69 S.W.3d 414 (2002)). In de novo review cases, we will not reverse a finding of fact by the trial judge unless it is clearly erroneous. *Id.* (citing *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000)). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* (citing *Nielsen, supra*). The amount of child support lies within the sound discretion of the trial judge, and the trial judge's finding will not be reversed absent an abuse of discretion. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002) (citing *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *Smith v. Smith*, 337 Ark. 583, 990 S.W.2d 550 (1999)). In applying the child support chart, there must first be a determination of the payor's income. "Income" is defined in Ark. Code Ann. § 9-14-201(4) (Supp. 2001). While nearly mirroring the statutory definition, our supreme court provides a slightly more expansive definition of "income" in *Administrative Order No. 10: Arkansas Child Support Guidelines* § II, 331 Ark. 581 (1998):

Income means any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, worker's compensation, disability, payments pursuant to a pension or retirement program, and interest[.]

The definition is intentionally broad to encompass the widest range of sources consistent with this State's policy to interpret "income" broadly for the benefit of the child. *See also Paschal v. Paschal*, 82 Ark. App. 455, 117 S.W.3d 650 (2003).

First, we dispose of the argument that this was an improper order concerning future and uncertain income. To the contrary, when the order on appeal was filed, the stock sale was completed and a certain figure representing fifteen percent of the net proceeds was finalized. \$66,482.86 had been paid into the registry of the court at the time that the order on appeal was filed of record. This was certain, specific, and received income.

Non-periodic monetary judgments meet the definition of "income" for purposes of child support. *See Evans v. Tillery*, 361 Ark. 63, 204 S.W.3d 547 (2005). A monetary gift from a parent's grandparents, a certificate of deposit, and a retirement payment are all properly considered "income" for child support purposes. *See Ford v. Ford*, 347 Ark. 485, 495, 65 S.W.3d 432, 439 (2002). We have no hesitancy holding that this one-time stock sale's proceeds were properly considered "income" for child support purposes.

Next, Somers argues that this income should have been included only as of the following year's tax returns. There is no authority cited for the proposition that the income must be counted at a later time, as opposed to the present, when it is disbursed to the non-custodial payor. For this reason alone, we reject the argument that the trial court erred in assessing a child support award on the amount that was received before the order on appeal was entered. It was income, generated in 2006, while Alice was a minor.

Lastly, Somers asserts that this large lump sum results in a windfall to Katherine. We disagree. The trial court explicitly ordered that Katherine would be required to seek trial court approval for any expenses made from this amount and would be required to account for any expenditures. The trial court added that Katherine would be permitted to invest the monies prior to Alice's eighteen birthday without prior approval of the court. Given that Somers's obligations to Alice would end when she reached the age of majority, and that Alice was expected to attend college, we cannot discern how this resulted in a windfall to Katherine.

For the foregoing reasons, we reverse the increased alimony award and reinstate the earlier order of \$1935.50 in monthly alimony, and we affirm the lump-sum award of child support.

Reversed in part; affirmed in part.

GLOVER and HEFFLEY, JJ., agree.